Supreme Court, U.S.
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No. 99-1086

In The

Supreme Court of the United States

DEBORAH D'ANNUNZIO and
STEPHEN DENUNZIO,

Petitioners,

v.

BAYLOR UNIVERSITY,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BAYLOR UNIVERSITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Baylor University, a Texas non-profit corporation, does not have any parent corporations. Baylor University has no nonwholly-owned subsidiaries.

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BAYLOR UNIVERSITY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Baylor University ("Baylor"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Deborah D'Annunzio and Stephen DeNunzio, seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit rendered on August 23, 1999.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Courts Below

This case proceeded to trial before a jury on June 15, 1998. At the close of Petitioners' evidence, the District Court dismissed Stephen DeNunzio's claim because he failed to present sufficient evidence to raise an issue to submit to the jury. Following the presentation of further evidence, the District Court submitted Deborah D'Annunzio's Fair Labor Standards Act retaliation claim to the jury. After deliberating less than one and a half hours, the jury found that Baylor did not retaliate against Ms. D'Annunzio.

Petitioners appealed to the United States Court of Appeals on August 27, 1998, and raised six issues for appellate review. The Fifth Circuit heard oral argument on August 4, 1999, and, less than three weeks later, on August 23, 1999, the Court of Appeals panel issued an unpublished per curium opinion affirming the judgments of the District Court in their entirety. Petitioners requested rehearing en banc. Not a single judge of the

Fifth Circuit thought that the case even merited a poll of the Court on the Petition for Rehearing En Banc; thus, the Court denied the Petition for Rehearing En Banc on September 21, 1999.

Statement of Facts

Most of the "facts" contained in Petitioners' Statement of Facts are not relevant to the issues on appeal. Further, many of these facts were hotly contested at trial, and the jury obviously rejected Petitioners' version of the facts. Petitioners have apparently decided to include a lengthy unnecessary recitation of contested facts in an effort to place their case in a more favorable light before this Court. As Petitioners have submitted a lengthy factual recitation, Baylor must at least respond with a limited recitation of the facts which the jury found to be more credible.

Baylor employed Petitioner Deborah D'Annunzio as an employee in Baylor's Student Financial Aid Office. During the three years that she worked at Baylor, Ms. D'Annunzio held several different positions in the Financial Aid Office. At the time of her termination, Ms. D'Annunzio worked as a Financial Aid Counselor.

Ms. D'Annunzio's husband, Stephen DeNunzio, was a student at Baylor during the first two years of Ms. D'Annunzio's employment at Baylor. Mr. DeNunzio started as a law student, but he then switched to a master's degree program in educational psychology. Ms. D'Annunzio also pursued a master's degree in educational psychology as a part-time student by taking evening classes.

By the summer of 1996, Ms. D'Annunzio determined that it would take her three years to complete her master's degree if she continued to attend school part-time but that she could complete the degree in one year if she attended school full-time. Realizing that she could earn more money once she obtained the master's degree, it made economic sense for Ms. D'Annunzio to quit her job and attend school full-time; however, Ms. D'Annunzio did not want to give up the income from her job at Baylor. Thus, Ms. D'Annunzio set out to cause enough trouble at work so that Baylor would have to fire her, and she could then make a claim for unemployment compensation and perhaps also sue Baylor. Ms. D'Annunzio even registered for a full course load for the fall semester before her employment at Baylor was terminated. During the Summer of 1996, Ms. D'Annunzio began challenging her supervisor, Pat Lucas, and acting disrespectfully toward her. Baylor attempted to work with Ms. D'Annunzio to correct her performance problems rather than terminating her as Ms. D'Annunzio desired. With the fall semester about to start in a few weeks, Ms. D'Annunzio needed to do something to force Baylor to terminate her; thus, she engaged in a yelling fit directed toward Ms. Lucas on August 8, 1996.

A number of witnesses testified about Ms. D'Annunzio's behavior at the time she threw the fit. According to the witnesses, Ms. D'Annunzio was standing up, waving her arms, and yelling at Ms. Lucas. Ms. D'Annunzio told Ms. Lucas that Ms. Lucas did not know what was going on in the office and was not concerned about the employees. Ms. D'Annunzio was shouting so loudly that Ms. Lucas had to close the door because the shouting

could be heard all over the office. In all the years she had worked at Baylor, Ms. Lucas had never seen an employee behave in such a manner.

Robert Allen, another supervisor, heard Ms. D'Annunzio's voice from his office fourteen steps away and went to investigate. He described the tone of her voice as very angry and very hostile. Another witness, Celeste Sheehy, described Ms. D'Annunzio's tone of voice as being very accusatory toward Ms. Lucas. Ms. Sheehy was "floored and shocked" by Ms. D'Annunzio's behavior. Ms. Sheehy described the incident as a personal and professional attack on Ms. Lucas. Another witness, Kathy Gulley, testified that Ms. D'Annunzio was "going nuts" during the incident and that she was scared by the behavior. Another witness to the incident, Julie Burleson, testified that she thought to herself, "She must be trying to get herself fired."

Ms. Lucas needed to confer with her supervisor, Jeanette Kucera, about what should be done about Ms. D'Annunzio's behavior. Ms. Kucera was out-of-town on the day of the incident, and Ms. Lucas conferred with her when she returned to work. Due to the tension and turmoil created in the office by Ms. D'Annunzio's behavior, the decision was made to send her home pending a final decision. Although she was told that she was simply being asked not to report to work for a few days, Ms. D'Annunzio took the position that she was being fired and proceeded to pack up and clear out her office. After several meetings, Ms. D'Annunzio's supervisors determined that it would be best for all concerned to terminate her employment, and Baylor informed Ms. D'Annunzio of the termination decision on August 16, 1996. At the

time the termination decision was made, Ms. Lucas and Ms. Kucera did not know that Ms. D'Annunzio had filed a complaint with the Department of Labor. Shortly after the termination, Ms. D'Annunzio registered to take an additional class for the fall semester. Ms. D'Annunzio graduated one year after the termination and obtained employment at a higher salary than she had earned at Baylor.

After obtaining his master's degree, Stephen DeNunzio was hired in January 1996 for a ten month term to work as a project assistant on a state-funded research project being conducted by a Baylor professor. By the summer of 1996, there was some uncertainty as to whether the grant would be renewed, and Mr. DeNunzio searched for other employment. He quickly found another job in the field in which he had been trained, and he resigned from his Baylor job prior to the end of the ten month period and took the new job. He left that job a year later for another higher paying job. By the time of trial, Mr. DeNunzio was earning more than he had when he worked at Baylor.

REASONS FOR DENYING THE WRIT

Petitioners assert that this Court should grant a Writ of Certiorari in order to determine the scope of protection afforded by the anti-retaliation provision of the Fair Labor Standards Act ("FLSA") and to secure uniformity of decisions among the Circuit Courts of Appeal. As will

be discussed in more detail below, this is not an appropriate case for the Court to determine the scope of protection provided by the anti-retaliation provision of the Fair Labor Standards Act. Further, the Fifth Circuit correctly decided this case.

First Ground – This Case Does Not Merit Supreme Court Review

Petitioners assert that the Court should grant a Writ of Certiorari in order to determine the scope of protection afforded by the anti-retaliation provision of the Fair Labor Standards Act and to secure uniformity of decisions among the Circuit Courts of Appeal. While there may be a split in authority among the Courts of Appeal as to the scope of the anti-retaliation provision, this is not the case in which to resolve the issue. Had the Court desired to address the issue this term, the Court had a case before it in which the issue was clearly presented in an en banc decision from the Ninth Circuit, *Lambert v. Ackerly*, 180 F.3d 997 (9th Cir. 1999) (en banc), *cert. denied*, 2000 U.S. LEXIS 591 (Jan. 18, 2000); however, the Court recently declined to grant a Writ of Certiorari in the *Lambert* case. If the *Lambert* case does not merit Supreme Court review, then the instant case certainly does not merit Supreme Court review.

Petitioners are requesting that this Court reach and decide an issue which the Fifth Circuit wisely and correctly decided that it need not reach. The Fifth Circuit, after reviewing the entire trial record of almost 500 pages of testimony, concluded that the jury charge did not create a substantial and ineradicable doubt that the jury

was properly guided in its deliberations. Petitioners would have this Court conduct another evidentiary review to determine whether this Court believes that the jury instructions created a substantial and ineradicable doubt that the jury was properly guided in its deliberations. Petitioners are contending that the Fifth Circuit misapplied the standard of review for claims of error in a jury charge. This is a contention that the Fifth Circuit misapplied a rule of law. As this Court's Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." There is no question that the Fifth Circuit properly stated the applicable standard of review for asserted claims of jury charge error, and, as will be discussed in more detail below, the Fifth Circuit properly applied that rule of law.

What Petitioners really seek is an advisory opinion. Petitioners want this Court to adopt the liberal interpretation of the Fair Labor Standards Act anti-retaliation provision; however, even if the Court adopted that position, it would not affect the result in this case. Petitioners would still lose the case under the liberal interpretation. This Court does not sit to issue advisory opinions; rather, it reviews judgments. The judgments of the District Court and Court of Appeals are correct, and this Court need not further review them. This case is of no importance other than to the parties, and the case does not merit the attention of this Court. In addition to being an unimportant case, the case was, as will be demonstrated below, correctly decided.

Second Ground – This Case Was Correctly Decided

In their Petition, Petitioners claim that the District Court erred in two respects: (1) in the wording of the jury instructions given to the jury regarding Deborah D'Annunzio's claim and (2) in directing a verdict against Stephen DeNunzio. Petitioners further claim that the Fifth Circuit erred in affirming the District Court's judgment and rulings.

There are two standards of review applicable to the challenged rulings. The standard of review for an alleged erroneous jury instruction is as follows:

> First, the challenges must demonstrate that the charge as a whole creates "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." Second, even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case. If a party wishes to complain on appeal of the district court's refusal to give a proffered instruction, that party must show as a threshold matter that the proposed instruction correctly stated the law.

Mooney v. Aramco Services, Inc., 54 F.3d 1207, 1216 (5th Cir. 1995) (*quoting FDIC v. Mijalis*, 15 F.3d 1314, 1318 (5th Cir. 1994)). The standard of review for the second issue will be discussed following the discussion of the first issue.

Applying the standard of review for jury instructions, the Fifth Circuit reviewed the entire record and determined that there was no substantial and ineradicable doubt whether the jury was properly guided in its

deliberations. The record also demonstrated that the challenged instruction could not have affected the outcome of the case. Petitioner D'Annunzio argued that the instruction was harmful to her because it caused the jury not to consider various events which Petitioner alleged were retaliatory and which took place before a formal complaint was filed. Both Petitioners testified that a formal complaint was filed on July 15, 1996, well before the termination occurred in August 1996. Thus, the jury had before it evidence that Baylor terminated Petitioner D'Annunzio after she filed a formal complaint with the Department of Labor. The jury had to decide whether Petitioner was terminated for her insubordinate conduct or for filing a complaint with the Department of Labor. The jury obviously decided that Baylor terminated her for insubordinate behavior. As the jury had before it evidence that Petitioner made a formal complaint prior to the termination, the District Court's instructions to the jury could not have changed the outcome. The jury had to decide whether unlawful retaliation was the reason for the termination, and the jury decided that it was not.

The District Court did not tell the jury not to consider alleged retaliatory conduct which occurred after the informal complaints but before the formal complaint. In fact, Petitioner D'Annunzio testified at length about the informal complaints and the alleged retaliatory conduct in response thereto. Thus, the jury was able to fully consider this alleged conduct and to determine whether Baylor was an employer which would retaliate for complaints of FLSA violations.

A review of the entire record revealed that the challenged instruction could not have affected the outcome of

the case. The trial court allowed Petitioner to present evidence of both her informal and her formal complaints, and Petitioner was allowed to detail all of the alleged retaliatory conduct. The jury simply chose not to believe Petitioner's concocted story and instead found the Baylor witnesses to be considerably more credible. While the transcript of a trial often does not reveal much about a witness's credibility, the trial transcript in this case shows that neither Petitioner was credible. The transcript of their testimony shows that they were evasive, exaggerated their stories, gave non-responsive answers, tried to testify to matters which were the subject of an order on a motion in limine, and would not admit the obvious. Indeed, had the trial court used Petitioner's suggested charge to the jury, the result would have been the same. The jury simply did not believe that complaints about overtime were the reason for the termination; rather, Ms. D'Annunzio's inappropriate behavior caused her termination. As a review of the record showed that the challenged instruction could not have affected the outcome of the cause, the Fifth Circuit properly affirmed the judgment.

Because the Fifth Circuit determined that it did not have a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations, the Court did not have to address the issue of the scope of the anti-retaliation provision of the FLSA. As the Court did not address the scope of the provision, it could not possibly have erred on this point as Petitioners claim.

With regard to Stephen DeNunzio's claim, Mr. DeNunzio contends that the District Court erred in granting judgment against him as a matter of law following the

conclusion of Petitioners' case in chief. The applicable standard of review is set forth in Federal Rule of Civil Procedure 50(a)(1) which provides:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

"If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper." *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). "A mere scintilla of evidence is insufficient to present a question for the jury." *Id.* The appellate courts use the same standard in reviewing the decision of the trial court. *Houser v. Sears Roebuck & Co.*, 627 F.2d 756, 757 (5th Cir. 1980).

The only activity which Mr. DeNunzio testified to and which could possibly be protected activity was his claim to have discussed with a co-worker and his supervisor some unspecified opinion that he had formed about Baylor. Such discussion would not amount to protected activity, and Mr. DeNunzio fails to meet even the liberal interpretation adopted by some circuits. Mr. DeNunzio also failed to present any evidence that his supervisor knew about his wife's alleged protected activity. The fact

that someone employed by Baylor may know of protected activity is immaterial if the relevant decision-maker does not. *Long v. Eastfield College*, 88 F.3d 300, 307 (5th Cir. 1996); *Larson v. Club Corporation of America*, 855 F.Supp. 247, 251 (N.D. Ill. 1994). Because Mr. DeNunzio failed to produce any evidence that his supervisor knew of the alleged protected activity, Baylor was also entitled to judgment as a matter of law on this basis.

In summary, the District Court gave Petitioners a full and fair trial. The court allowed Stephen DeNunzio to present his case, and the court granted judgment as a matter of law after Petitioners rested and it was apparent that Mr. DeNunzio could offer no evidence on at least two elements of his claim. The District Court allowed Deborah D'Annunzio's claim to go to the jury, and the jury, having heard three days of evidence, promptly decided that Baylor terminated Ms. D'Annunzio for her insubordination rather than for filing a complaint with the Department of Labor.

CONCLUSION

Petitioners have failed to provide any compelling reasons for this Court to grant a Writ of Certiorari. Petitioners contend the Fifth Circuit Court of Appeals reached an incorrect result; however, this appears to be an argument that the Fifth Circuit erred in its determination that the jury instructions did not create a substantial and ineradicable doubt that the jury was properly guided in its deliberations. The Fifth Circuit reviewed the entire record of the trial in reaching this conclusion, and this

Court would necessarily have to conduct the same evidentiary review. Such an evidentiary review is not favored by this Court. Further, this case has not been used by the District Court or the Court of Appeals to state a new and important position on an important or unsettled question of the law. Instead, this is a case only of significance to the parties. Additionally, the Fifth Circuit Court of Appeals was correct in its decision. This case does not merit further review by this Court.

For all of the foregoing reasons, Respondent Baylor University requests that Petitioners' petition be denied.

Respectfully submitted,

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